Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

NELSON LYVETTE ARMALY,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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54 pp

QUESTION PRESENTED

Whether the court below required the Government to carry the burden of proof on the issue of consent to search in a motion to suppress evidence and found consent was given, where the Petitioner/Defendant specifically stated "yes" to the question. "Do you mind if I search your bag?"

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Pursuant to Rule 26.1, Fed.R.App.P., Petitioner Nelson Lyvette Armaly, certifies that the following persons and entities may have an interest in the outcome of this case:

1. Nelson Lyvette Armaly, Petitioner/Defendant

2. David Rodney Brown, Assistant United States Attorney

3. Hon. Ralph W. Nimmons, Jr., United States District Judge

4. Tamra Phipps, Assistant United States Attorney

5. Paul I. Perez, United States Attorney, Middle District of Florida

6. Peggy Morris Ronca, Assistant United States Attorney

7. Jacob A. Rose, Counsel for Petitioner/Defendant

8. Hon. Howard T. Synder, United States Magistrate Judge

9. The Rose Law Firm, L.L.C.

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STATEMENT OF JURISDICTION

(i) The Judgment and Order sought to be reviewed were entered on 12 February 2003.
(ii) On 15 May 2003, the Honorable Justice Kennedy acting on behalf of the Court extended the time for filing this Petition for Writ of Certiorari to 10 June 2003.
(iii) There is no reliance on Rule 12.5
(iv) Jurisdiction to review on a writ of certiorari is based on 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(Amendment 4 to the Constitution of the United States of America).

STATEMENT OF THE CASE

Federal jurisdiction in the court of first instance commenced when Petitioner/Defendant, NELSON LYVETTE ARMALY (hereinafter referred to as "Armaly"), was arrested on September 18, 2001, and thereafter indicted, tried and convicted on Conspiracy to Distribute Cocaine in violation of 21 U.S.C. §§846 and 841(b)(1)(B) (Count I) and Possession and Aiding and Abetting the Possession with

Intent to Distribute Cocaine in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(B), and 18 U.S.C. §2. (Doc. #11).

A. Course of Proceedings and Disposition in the Court Below
ARMALY IS PRESENTLY INCARCERATED

After Armaly's Indictment, he filed a Motion to Suppress (Doc. #30) contending that he did not give consent to have his traveling bag, in which contraband was found, searched. Evidentiary hearings were held on November 20 and 26, 2001 (Transcript of 11/20/01 ["First Tr."]); (Transcript of 11/26/01 ["Second Tr."]). (Doc. #49; #50).

The Motion was considered by the Magistrate Judge, pursuant to the General Order of Assignment, and he filed his Report and Recommendation ("R&R")(Doc. #48), in which he recommended that the Motion be denied. Armaly objected to the R&R (Doc. #55) and the trial court, on January 23, 2002, adopted the R&R as its own and denied the Motion to Suppress. (Doc. #60).

On May 30, 2002, the trial court conducted a sentencing hearing and committed Armaly to the custody of the United States Bureau of Prison for ninety-seven (97) months on each count of the Indictment, to run concurrently. (Doc. #90). The Eleventh Circuit affirmed the judgment of conviction.

B. Statement of Facts

Since the Motion to Suppress focused on the R&R of the Magistrate Judge, the facts are extracted from the R&R except where noted. (Doc. #48).

Detective Troy Clausen worked with the Jacksonville Sheriff's Office for approximately eight years, and was assigned to the Organized Crime Unit and worked on the drug enforcement task force conducting federal and state drug interdictions at bus stations, the Amtrak Railway system, and airports. His total law enforcement experience at the time of the suppression hearing was eight years. He worked with Drug Enforcement Agency (DEA) Agents Jerry Wells and Bruce Savell and occasionally with customs or border patrol agents. (*Id.*)

Agent Wells had been employed by the DEA for ten years. He had been assigned to the Jacksonville district office for about four months, and his duties include assisting the Jacksonville Interdiction Task Force with drug interdictions at the bus and train stations as well as the airport. He had fourteen years total law enforcement experience, which includes physical contact and familiarity with powder cocaine. (*Id.*)

Border Patrol Agent Harold Douglas Hillin had been employed by the United States Border Patrol for fifteen years, and he worked with the drug interdiction team, investigating whether suspected aliens possess the required immigration documents and enforcing immigration laws. (*Id.*)

On the morning of September 18, 2001, Detective Clausen was working with Agent Wells at the bus station in downtown Jacksonville. At approximately 7:05 a.m., the two of them boarded a bus headed for Atlanta. The bus arrived in Jacksonville from Ft. Lauderdale. (*Id.*)

Detective Clausen and Agent Wells were wearing plain clothes and carrying concealed weapons, which

were not visible to bystanders. Their badges were attached to their waistband and were never brandished above their heads or displayed in any other way. Upon boarding, Detective Clausen proceeded to the rear of the bus, and Agent Wells situated himself next to the first row of seats in the front of the bus. Agent Wells made a general announcement and stated in substance:

> We were both law enforcement officers . . . conducting a routine bus check, that people were not under arrest, and that – with their voluntary cooperation . . . we would appreciate taking a look at their bus tickets and some form of identification, that they were free to leave, and that they were free to decline any interviews or searches that we would request, and that we would start at the back of the bus and work our way forward.

(Second Tr. at 11-12).

After Agent Wells made this announcement, he joined Detective Clausen at the rear of the bus. The general question asked each individual was whether they possessed "any guns, knives, drugs, or large sums of cash." (Second Tr. at 15). There were about twenty passengers on the bus. The officers began working their way forward, careful not to block the way of any passengers who might desire to leave prior to or during the interview. Agent Wells positioned himself behind the seat occupied by the passenger being questioned, and Detective Clausen stood behind him and observed. (*Id.*)

Agent Wells proceeded to Armaly, who, although he denied having any identification, had a bus ticket

in the name of Mario Miller. *See* Government Exhibit 3. Agent Wells asked Armaly if he was traveling with anyone and if he had any carry-on luggage, both of which he denied. However, when Agent Wells later put his hand on the bag above Armaly to ask if that particular one was his, Armaly admitted it was. While touching the bag, Agent Wells did not "squeeze . . . or manipulate the bag or lift the bag in any way." (Second Tr. at p. 27). Armaly did not maintain eye contact with the officers and seemed somewhat nervous and rigid. (*Id.*)Agent Wells requested permission to search Armaly's bag. Agent Wells testified at the suppression hearing that Armaly clearly understood what was being said to him and, in essence, that there was no failure of communication. (Second Tr. at p. 26). He stated that he asked Armaly for permission to search just once, (Second Tr. at pp. 104-105) and that, specifically, he asked Armaly, "do you mind if I search your bag?" (Grand Jury testimony page 12). He responded that Armaly specifically stated "yes" (Grand Jury testimony page 12 and Second Tr. at p. 27-28) and that he (Agent Wells) removed the bag from the overhead head rack, placed it in an empty seat behind the one in which Armaly was seated and conducted his search. (Second Tr. at p. 28-29). Additionally, he testified that Armaly did not stand during the search, but, rather, was bent over and leaning forward. (Second Tr. at p. 105-106). (Doc. #41).

Agent Wells testified as follows at the suppression hearing on November 26, 2001:

> Q. Now, you did repeatedly . . . ask Mr. Armaly for permission to search the blue bag that's the subject --
>
> A. No. I asked him once, sir.

***

Q. You stated to the Grand Jury that you asked him if he minded, on page 12 . . . beginning on line 6, it states . . . I placed my hand on it and asked him if it was his . . .

A. Correct.

Q. And I asked him if he minded if I search the bag.

A. Correct.

Q. Alright,

A. To which he replied "yes."

Q. -- Is there a reason, sir, that you did not take yes to that question to mean anything other than, yes, I mind?
Let me rephrase it. Your question, and you said you only asked it once, is the answer in quotes exact, do you mind if I search? Answer, yes.

A. He answered, yes. I assumed that he meant that I could search his bag. And he didn't object.

(Second Tr. pp. 104 to 107).

Armaly did not say "No, I don't mind." Agent Wells testified that this was his assumption.

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

The central issue in this case is whether the lower court required the Government to carry the burden of proof on the issue of consent to justify the lawfulness of the search. It bore the burden of proving that this consent was clear, unequivocal and freely given. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Despite Armaly's very specific refusal to give consent, the arresting officer testified that he assumed Armaly gave consent. The totality of the surrounding circumstances, along with the characteristics of the details of the interrogation, inescapably points to one conclusion; that is Armaly did not give permission to have his bag searched. The Motion to Suppress the results of that search should have been granted in order to uphold the inviolability of the Fourth Amendment to the United States Constitution.

It is well established that the prosecution bears the burden of proving that consent was voluntarily given. *Florida v. Royer*, 460 U.S. 491, 497 (1983); *Schneckloth v. Bustamante*, 412 U.S. 218, 222 (1973). While courts are to examine the totality of the circumstances surrounding the consent in order to determine whether it was given, *Schneckloth*, 412 U.S. at 227, the factual circumstances with respect to whether Armaly gave consent here are undisputed and relatively limited. The total evidence on this point came from Agent Wells whose testimony at the suppression hearing before the Magistrate Judge on November 26, 2001, cleared up any doubt as to whether consent was given.

It was Agent Wells who controlled the inquiries; it was Agent Wells who decided what questions to ask; it was Agent Wells who had total control of how to obtain

permission for the search. It was also Agent Wells' position that Armaly had no problems understanding what he was being asked. If the one question and answer led Agent Wells to "**assume**" Armaly gave consent, one thing is certain: whether a "yes" or "no" answer was given, it would have been deemed a consent. If Armaly had answered the question "no" then, of course, Agent Wells would be able to say he stated that he did not mind - because that would have been a proper interpretation of the answer to that question. On the other hand, as is the case here, a "yes" answer also, according to Agent Wells, meant the same thing. No reasonable officer could believe that consent was unequivocally given when either a "yes" or "no" answer to a request for permission to search would mean permission was granted.

If the judgment of the lower tribunal stands the law enforcement officers would be free to always seek a suspect's consent by asking questions from which consent could be assumed no matter what the actual response. The lower court should have required the Government to bear the burden of proving consent to search; this failure contravenes the dictates of the Fourth Amendment to the United States Constitution, and, thus, supports allowance of the Writ.

CONCLUSION

The fruits of the poisonous tree of an illegal search was the only evidence against Armaly, and the Fourth Amendment protection against unreasonable searches and seizures must predominate. The Petitioner prays that the Petition for Writ of Certiorari be granted in order to uphold his Fourth Amendment right against unreasonable searches and to require the Government to bear proof on the issue of consent.

Respectfully submitted,

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Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-13221
Non-Argument Calendar

D.C. Docket No. 01-00268-CR-J-21

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NELSON LYVETTE ARMALY,
a.k.a. Mario Miller
a.k.a Nelson Lyvette Armaly, Jr.,

Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

(February 12, 2003)

Appendix A

Before ANDERSON, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

Nelson Lyvette Armaly appeals his conviction and 97-month sentence for conspiracy to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B), and possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B). Armaly argues that the district court erred by denying his motion to suppress because he did not consent to a search of his bag in which the cocaine was ultimately discovered, by refusing to award Armaly a one-point reduction pursuant to U.S.S.G. § 3E1.1(b), and by not granting his request for a mitigating role reduction under U.S.S.G. § 3B1.2. We AFFIRM.

We review a district court's order denying a defendant's motion to suppress de novo but accept as true the court's factual findings unless they are clearly erroneous. United States v. Ramirez-Chilel, 289 F.3d 744, 748-49 (11th Cir. 2002), cert. denied, _____S. Ct. _____ (2003). The facts are to be construed in the light most favorable to the party who prevailed below. United States v. Hall, 47 F.3d 1091, 1094 (11th Cir. 1995). Whether a suspect voluntarily gave consent to a search is a question of fact to be determined by the totality of the circumstances. Ramirez-Chilel, 289 F.3d at 752. When the validity of a search rests on consent, the government bears the burden of proving that the consent was obtained and that it was freely and voluntarily given. Florida v. Royer, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324 (1983).

Armaly argues that he never consented to a search of his bag by law enforcement officials during a routine drug interdiction on a passenger bus. According to the unrebutted testimony of the interviewing officer, Agent Wells, Armaly answered "yes" to Well's question whether Armaly "minded if [Agent Wells] searched [his] bag." R4 at 105-06. Thus, Armaly argues, Agent Wells merely assumed that Armaly had given consent, Appellant's Br. At 10, and Wells does not deny making that assumption. R4 at 106. "[W]hen either a 'yes' or 'no' answer to a request for permission to search would mean permission to search would mean permission was granted," Armaly contends, consent cannot be unequivocally given. Appellant's Br. at 11.

The district court's finding that Armaly "knowingly and voluntarily consented to the search of his luggage," R1-48 at 21, however, was not clearly erroneous. "The circumstances under which a[n individual's response to a law enforcement officer's search request] is made must be considered in determining that statement's equivocality." United States v. McCann, 465 F.2d 147, 158 (5th Cir. 1972). Here, even if Armaly had intended to decline Agent Wells' request to search the bag, he failed to object upon learning that Wells interpreted his response as consent. The Seventh Circuit agrees:

> Defendants submit that [the] response "Sure" to [the] question "Do you mind if I take a look?" should be interpreted as "Sure, *I mind.*" Perhaps in the abstract one could say that given the phrasing of [the officer's] question, [the] response to it is ambiguous and thus capable of being interpreted as either "Go

> ahead" or "No way." ... The only conclusion to be drawn from the totality of the evidence is that... "Sure" meant, "Sure, go ahead." The crucial fact is [the defendant's] failure to protest upon learning that [the officer] understood his response as a consent to the search. Had [the defendant] not agreed to the search, now was the time to make that clear.

United States v. Price, 54F.3d 342, 246 (7th Cir. 1995) (footnote omitted). Also, we have held that, where a defendant makes no objection at the time of the search and there is no evidence of coercion, the trial judge's conclusion that consent to search was voluntarily given is not clearly erroneous. See United States v. Villarreal, 565 F.2d 932, 987 (5th Cir. 1978). In this latter regard, the Supreme court has also observed that, where a law enforcement officer asked "'Mind if I check you?'", there was "no indication that [the person] was required to consent to a search." United States v. Drayton, 536 U.S. 194, _____, 122 S. Ct. 2105, 2112, 2113 (2002) (holding that defendant's consent to search was voluntary where plain clothes officers with badges displayed during a routine bus interdiction asked "Mind if I check you?" and "gave the passengers no reason to believe that they were required to answer the officers' questions," "did not brandish a weapon or make any intimidating movements," "left the aisles free so that [passengers] could exit," though one officer remained at the front of the bus, and "spoke to passengers one by one and in a polite, quite voice," even though the officers gave no indication that passengers were free to refuse to be searched or to answer questions).

Armaly argues, however, that "the fact that [he] did nothing once the search began does not cure the impropriety of the search as, even according to Agent Wells, it was conducted behind Armaly's seat and Armaly was bent forward in his own seat." Appellant's Br. At 12. Given the location of the bag in the luggage compartment over Armaly's head, we cannot believe that he was entirely unaware that Agent Wells was proceeding with the search. Accordingly, under the totality of the circumstances, the district court did not clearly err in finding that Armaly consented to the search.[1]

---

[1] The magistrate judge based his finding on two versions of the conversation, both of which he found indicated consent. First, Agent Wells testified at the suppression hearing on direct examination that he requested permission to search Armaly's bag and Armaly stated "yes." R4 at 27-28. Second, Wells' testimony before the grand jury "reflects that, when he queried Mr. Armaly as to whether [Armaly] minded if [Wells] searched his carry-on bag, Defendant indicated, 'Yes,' but then stated, 'No, I don't mind.'" R1-48 at 21-22 (Magistrate Judge's Report and Recommendation). Armaly argues, however, that "the [court] reporter put in quotes the statement of Agent Wells ['No, I don't mind'] as being something specifically stated by Armaly [when in fact] the Agent clarified that he stood by his initial report, and...never testified that he believed Armaly changed his mind, as the Magistrate Judge found...." Appellant's Br. At 12. We find this account plausible. The exact testimony of Agent Well was: "And I asked him if he minded if I searched the bag, to which he replied yes – *that* he replied, 'No, I don't mind,' that it was permissible." R1-40, Ex. 5 (emphasis added). If Armaly had changed his mind, the testimony should have read: "*then* he replied, 'No, I don't mind.'" The use of the word "that" at least suggests that the phrase "No, I don't mind" was an interpretation by Wells and not an exact statement by Armaly. As noted above, we affirm the district court's finding, however, without relying on this additional testimony. Furthermore, we find no conflict between Agent Wells' initial testimony at the suppression hearing and his written report, that Armaly answered

Armaly next asserts that he is entitled to a one-point reduction pursuant to U.S.S.G. § 3E1.1(b) (Nov. 2001) in addition to the two-point reduction in his offense level for acceptance of responsibility awarded to him by the district court under § 3E1.1(a). Section 3E1.1(b) provides that, for certain offense levels, where a defendant has clearly accepted responsibility for an offense, and thus qualifies for a decrease under § 3E1.1(a), the district court may further reduce the base offense level by one additional point where:

> the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
>
> (1) timely providing complete information to the government concerning his own involvement in the offense; or
>
> (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.

"The district court's determination of whether a defendant is entitled to a reduction for acceptance of responsibility is a finding of fact which is entitled to great deference on appeal and will be affirmed unless clearly erroneous." United States

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"yes" when Wells asked permission to search the bag, and his more specific testimony before the grand jury.

v. Rodriguez, 959 F.2d 193, 195 (11th Cir. 1992) (per curiam). The timeliness of the defendant's conduct also "is an issue of fact, the resolution of which we review for clear error only." United States v. Gilbert, 138 F.3d 1371, 1373 (11th Cir. 1998) (per curiam).

"[T]o qualify under subsection (b)(2), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently." U.S.S.G. § 3E1.1, comment. (n.6). However, "awarding a decrease only on the condition that notice of intent to plead guilty be given before the government engaged in any trial preparation and without any regard to the attorney's opportunity to investigate the case, would raise serious question regarding the constitutionality of the guideline as applied." United States v. McConaghy, 23 F.3d 351, 353 (11th Cir. 1994) (per curiam). Therefore, in applying § 3E1.1(b)(2), we "must bear in mind the extent of trial preparation, the burden on the court's ability to allocate its resources efficiently, and reasonable opportunity to defense counsel to properly investigate." Id. At 353-54. However, "district courts should give more weight to the state of the Government's trial preparation than to the defendant's position or strategy." Gilbert, 138 F.3d at 1374.

In this case, the government was not spared the time and effort of preparing for trial. On Armaly's unopposed motion, the original January trial was continued to the February 2002 trial term. R1-57-59. The district court denied the suppression motion on 23 January 2002, and the government filed its proposed voir dire questions and

proposed jury instructions on 15 February 2002. Five days later, and nearly a month after the suppression motion was denied, Armaly agreed to proceed to a bench trial on stipulated facts. The trial was held two days later. R2-79. "As a general rule, pleas on the eve of trial are not timely." Gilbert, 138 F.3d at 1373. Thus, even if we were to consider a bench trial on stipulated facts the functional equivalent of a guilty plea for the purpose of applying § 3E1.1(b)(2), the offer was nevertheless untimely and, therefore, the district court's order denying the reduction not clearly erroneous.

Armaly argues, nonetheless, that his intention to resolve the case without a trial was made at "the earliest opportunity, consistent with protecting his constitutional rights under the Fourth Amendment" and that finding his acceptance of responsibility untimely because he moved to suppress evidence would impermissibly penalize him for exercising those rights. Appellant's Br. At 14. In Gilbert, however, we held that the district court's denial of a reduction under § 3E1.1(b)(2) was not clearly erroneous where the defendant pleaded guilty on the day of trial, even though the plea came just three days after the district court denied his motion to suppress. 138 F.3d at 1373-74.

> First, this court has declined to consider the Guidelines' limitations on some offense-level reduction to be improper penalties for exercise of legal rights. Second, looking at the timeliness of the plea *solely* from the defendant's perspective..., without taking into account the obvious fact that the Government had to prepare for trial and therefore did not benefit from avoiding trial preparation, defeats

> the purpose of § 3E1.1(b)'s incentive to plead early. It is after all a rare case when the defendant does not plead as soon as he believes it convenient and appropriate for him to do so. Thus, if the defendant's trial strategy (such as a choice to file a motion to suppress) is given undue weight, a guilty plea would almost always warrant a three-point reduction regardless of whether § 3E1.1(b)'s purposes have been served.

Id. at 1374 (citation omitted). The Second Circuit similarly concluded that filing a motion to suppress may itself impermissibly delay the proceedings, and therefore, rule out application of the reduction. See United States v. Rogers, 129 F.3d 76, 80-81 (2d Cir. 1997) (per curiam) (holding that where "the suppression hearing was the main proceeding" because, once suppression was denied, "convicting [the defendant] became child's play for the prosecution," an "offer to enter a conditional guilty plea and [a] bench trial on stipulated facts, coming *after* the suppression hearing, did not come sufficiently early in the proceedings to allow the court or the government to avoid the burden of litigating the case"). Because Armaly's agreement to a bench trial came two days before the trial and almost a month after his motion to suppress was denied, the district court did not clearly err by denying him the one-level reduction.[2]

---

[2] In his brief, Armaly does not specify whether he seeks the reduction under subsection (b)(1) or (b)(2) of § 3E1.1. We presume from the basis of his argument as described above, however, that he argued only for a reduction under the latter and therefore consider only it. We note, however, that Armaly is equally precluded from the one-point reduction authorized under subsection (b)(1) for "timely providing complete

Finally, Armaly argues that the district court erred by not granting his request for a four-level minimal role reduction under U.S.S.G. § 3B1.2(a). Appellant's Br. at 13. The defendant's role in an offense is a finding of fact, which we review only for clear error. United States v. Rodriguez De Varon, 175 F.3d 930, 937 (11th Cir. 1999) (en banc). The defendant has the burden of establishing a mitigating role in the offense by a preponderance of the evidence. Id. at 939. the determination "should be informed by two principles discerned from the Guidelines: first, the defendant's role in the relevant conduct for which she has been held accountable at sentencing, and, second, her role as compared to that of other participants in her relevant conduct." Id. at 940.

In many cases, the first inquiry will be dispositive. Id. at 945. "Where the relevant conduct attributed to a defendant is identical to h[is] actual conduct, []he cannot prove that []he is entitled to a minor role adjustment simply by pointing to

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information to the government concerning his own involvement in the offense" because his late stipulation to the facts did not spare the government its investigation of Armaly's crime. While it is irrelevant whether disclosure under the subsection (b)(1) permits the government to forego trial, see United States v. Zwick, 199 F.3d 672, 692 (3d Cir. 1999), "the information provided by the defendant [to qualify for a reduction under § 3E1.1(b)(1)] should be information regarding the crime which the Government has not yet discovered through its own investigative efforts." United States v. Hopper, 27 F.3d 378, 384-85 (9th Cir. 1994) (holding that "a complete disclosure of information [only] five days before [the defendant's] scheduled trial date" of information already known to the government does not obviate a government investigation and, therefore, does not justify the one-point reduction under subsection (b)(1)); see also United States v. Brack, 188 F.3d 748, 765 (7th Cir. 1999) ("[A] defendant who 'delays the disclosure of information to the Government until shortly before a scheduled trial does not qualify for [a § 3E1.1(b)(1)] reduction.'" (citation omitted)).

some broader criminal scheme...." Id. at 941. "Only if the defendant can establish that []he played a relatively minor role in the conduct for which []he has already been held accountable—not a minor role in any larger criminal conspiracy [for which he has not been held accountable]—should the district court grant a downward adjustment for [having a] minor role in the offense." Id. at 944.

The case is no different for that of a drug courier.-[3] "[W]hen a drug courier's relevant conduct is limited to her own act of importation, a district court may legitimately conclude that the courier played an important or essential role in the importation of those drugs." Id. at 942-43. That is the case here. Because Armaly was convicted during a bench trial on stipulated facts and the record is devoid of any other facts presented at trial, and because there was no consideration of relevant conduct, only offense conduct, by the district court in sentencing him, we find that Armaly was only held accountable at sentencing for the drugs that he actually transported. This district court could, therefore, conclude that he played an essential role in the transportation

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[3] A courier whose role in the offense "was limited to transporting or storing drugs and who is accountable under § 1B1.3 (Relevant Conduct) only for the quantity of drugs [he] personally transported or stored is not precluded from consideration for an adjustment under this guideline." U.S.S.G. § 3B1.2, comment. (n.3(A)). In other words, "[w]e do not create a presumption that drug couriers are never minor or minimal participants, any more than that they are always minor or minimal [but r]ather...hold only that the district court must assess all of the facts probative of the defendant's role in [his] relevant conduct." Rodriguez De Varon, 175 F.3d at 943; see also United States v. Boyd, 291 F.3d 1274, 1277 (11th Cir. 2002) (concluding that, by inserting application note 3(A), the Sentencing Commission ratified Rodriguez De Varon).

of the drugs. The judgment of the district court is therefore **AFFIRMED.**

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 3:01-cr-268-J-21HTS

NELSON LYVETTE ARMALY
a/k/a Mario Miller
JOHN JAMES SHEPHERD

a/k/a Sean Miller
a/k/a "Shep"
_____/

ORDER

This cause came on for consideration of the defendants' separately filed Motions to Suppress (Dkts. 30 and 31, respectively). This matter was considered by the Magistrate judge, pursuant to the general order of assignment, who has filed a report recommending that the motions be denied.

The Court has thoroughly reviewed the Report and Recommendation ("R&R"), the defendants' Objections (Dkts. 3 and 55) thereto, the various memoranda earlier filed herein, the transcripts (Dkts. 49 and 50) of the evidentiary hearing before the Magistrate Judge, and the exhibits received in evidence in connection therewith. The R&R is a thorough and accurate analysis of the issues presented, and

with which the Court agrees. The Court also adopts the Magistrate Judge's findings as its own.

The Court specifically comments as to a few points. Defendant Armaly makes much of Agent Wells' testimony that Armaly answered "yes" to Wells' question as to whether Armaly minded if he searched his bag. The Magistrate Judge's finding that Wells also said that Armaly added "No, I don't mind" is supported by the excerpt of Wells' grand jury testimony which was received by the Magistrate Judge as substantive evidence without objection. Transcript (Dkt. 50), p. 132.

The Court also agrees with the Magistrate Judge that the fact that Agent Wells and Detective Clausen wore their badges on their belts was not a "show of authority" as would vitiate a subsequent consent to search. The actions of the officers in *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998), are materially distinguishable. There, the officer "held his badge above his head and identified himself as a federal agent" as he was announcing to the passengers what he wanted the passengers to do. *Id.*, at 1357.

The Court has considered the other objections and point raised by the defendants in their post-R&R submissions, as well as in their memoranda prior to the R&R, and finds them to be without merit.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

1. The Report and Recommendation is **ADOPTED** as the Court's own and made a part hereof.

2. The defendants' motions (Dkts. 30 and 31) are hereby **DENIED**.

3. In accordance with discussions at the status conference on December 13, 2001, counsel for defendants shall have **until 4:00 p.m. on Monday, January 28, 2002,** within which to file a motion to sever, if appropriate. Should such motion be filed, the United States shall file its response thereto **by 12:00 noon, Thursday, January 31, 2002.** In the event that a motion to sever is filed, counsel shall, in view of the brevity of the above scheduling, serve upon all other counsel by hand or facsimile transmission their motion and response(s), respectively.

In anticipation that such a motion to sever will be filed, the Court hereby **schedules a** hearing thereon for **Friday, February 1, 2002, at 10:00 a.m.,** in Courtroom 2, United States Courthouse, 311 West Monroe Street, Jacksonville, Florida. Defendants' presence is required.

4. This case remains on the Court's February 4 – 22, 2003 trial calendar.

DONE AND ORDERED, at Jacksonville, Florida, this 23rd day of January, 2002.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Appendix B

Copies to: Counsel of record
Denise Seymour, Courtroom Deputy Clerk
Margaret Costa, Judicial Assistant
USM
Defendants c/o USM

Appendix C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 3:01-cr-268-J-21HTS

NELSON LYVETTE ARMALY
a/k/a Mario Miller
JOHN JAMES SHEPHERD

a/k/a Sean Miller
a/k/a "Shep"

REPORT AND RECOMMENDATION[4]

I. Status

This cause is before the Court on the following motions: (1) John H. Shepherd's Corrected Motion and Incorporated Memorandum of Law on the Admissibility of Tape Recordings and Transcripts (Doc. #27; Motion in Limine); (2) Motion to Suppress (Doc. #30; Armaly's Motionto Suppress); (3) Motion to Suppress and

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[4] Specific, written objections may be filed in accordance with 28 U.S.C. § 636 and Rule 6.02, Local Rules, United States District Court, Middle District of Florida, within ten (10) days after service of this document. Failure to file timely objections shall bar the party from a *de novo* determination by a district judge and from attacking factual findings on appeal.

Memorandum of Law in Support (Doc. #31; Shepherd's Motion to Suppress). An evidentiary hearing was begun on November 20, 2001, and continued and concluded on November 26, 2001. *See* Transcript of November 20, 2001, Evidentiary Hearing (First Tr.); Transcript of November 26, 2001, Evidentiary Hearing (Second Tr.).

II. Admissibility of Tape Recorded Conversations

In view of the fact Defendant has filed a corrected version of John H. Shepherd's Motion and Incorporated Memorandum of Law on the Admissibility of Tape Recordings and Transcripts (Doc. #24; Motion), the Court will enter a separate Order directing the Clerk of the Court to terminate the Motion. Therefore, the Court will address only the corrected version of the Motion, which is the Motion in Limine.

It is alleged by counsel for Defendant, John James Shepherd, the tape recording is "overwhelmingly unintelligible, inaudible, vague and otherwise unclear." Motion in Limine at 2. Admissibility is subject to the discretion of the trial court. *See United States v. Lively*, 803 F.2d 1124, 1129 (11th Cir. 1986); *United States v. Ruppel*, 666 F.2d 261, 272 (5th Cir. 1982); *United States v. Aisenberg*, 120 F. Supp. 2d 1345 (M.D. Fla. 2000). Accordingly, it is suggested the Motion in Limine be determined by the trial court at the appropriate time.[5]

[5] Mr. Shepherd's counsel agreed that whether the tape was admissible as evidence was not a suppression issue and was more suited for a motion in limine. *See* First Tr. at 4.

III. Motions to Suppress

Defendant Nelson Lyvette Armaly filed Armaly's Motion to Suppress and Defendant Nelson Armaly's Post Hearing Memorandum of Law and Argument in Support of Motion to Suppress (Doc. #44; Armaly's Memorandum). Shepherd's Motion to Suppress and Supplement Memorandum of Law (Doc. #42; Shepherd's Memorandum) were also filed. Defendants ask that various statements, as well as physical evidence, including bus tickets, personal papers, United States currency, and a wallet, be suppressed. *See* Armaly's Motion to Suppress at [unnumbered] 1; Shepherd's Motion to Suppress at [unnumbered] 1. The United States opposes each Motion. See United States' Response in Opposition to Defendants' Motions to Suppress Evidence (Doc. #43; Opposition).

A. Facts

Detective Troy Clausen has been with the Jacksonville Sheriff's Office for approximately eight years. He is assigned to the Organized Crime Unit and works on the drug enforcement task force conducting federal and state drug interdictions at bus stations, the Amtrak Railway system, and airports. His total law enforcement experience is eight years. He works with Drug Enforcement Agency (DEA) Agents Jerry Wells and Bruce Savell and occasionally with customs or border patrol agents.

Agent Wells has been employed by the DEA for ten years. He has been assigned to the Jacksonville district office for about four months, and his duties include assisting the Jacksonville Interdiction Task Force with drug interdiction at

the bus and train stations as well as the airport. He has fourteen years total law enforcement experience, which includes physical contact and familiarity with powder cocaine.

Border Patrol Agent Harold Douglas Hillin has been employed by the United States Border patrol for fifteen years. He works with the drug interdiction team, investigating whether suspected aliens possess the required immigration documents and enforcing immigration laws.

On the morning of September 18, 2001, Detective Clausen was working with Agent Wells at the bus station in downtown Jacksonville. At approximately 7:05 a.m., the two of them boarded the bus headed for Atlanta. The bus arrived in Jacksonville from Fort Lauderdale.

Detective Clausen and Agent Wells were wearing plain clothes and carrying concealed weapons, which were not visible to bystanders. Their badges were attached to their waistbands and were never brandished above their heads or displayed in any other way. Upon boarding, Detective Clausen proceeded to the rear of the bus, and Agent Wells situated himself next to the first row of seats in the front of the bus. Agent Wells made a general announcement and stated in substance:

> We were both law enforcement officers…conducting a routine bus check, that people were not under arrest, and that -- with their voluntary cooperation…we would appreciate taking a look at their bus tickets and some form of identification, that they

> were free to leave, and that they were free to decline any interviews or searches that we would request, and that we would start at the back of the bus and work our way forward.

Second Tr. at 11-12.

After Agent Wells made this announcement, he joined Detective Clausen at the rear of the bus. The general question asked of each individual was whether they possessed "any guns, knives, drugs, or large sums of cash." Second Tr. at 15. There were about twenty passengers on the bus. The officers began working their way forward, careful not to block the way of any passengers who might desire to leave prior to or during the interview. Agent Wells positioned himself behind the seat occupied by the passenger being questioned, and Detective Clausen stood behind him and observed.

When the officers came to Mr. Shepherd, who was seated one row behind Mr. Armaly on the opposite side of the bus towards the rear, Agent Wells asked to see his identification and bus ticket. Agent Wells was standing next to the back of Mr. Shepherd's seat, not blocking the aisle so Defendant could leave if he wished. Mr. Shepherd provided Agent Wells with a bus ticket in the name of Sean Miller, *see* Government Exhibit 2, and a duplicate driver's license from the Bahamas in the same name. *See* Government Exhibit 1. Agent Wells noted the ticket was one-way from Fort Lauderdale, Florida, and was paid for with cash at 11:04 p.m. on September 17, 2001, less than an hour before the departure time of 11:45 p.m. When asked if he had any carry-on luggage or any guns, knives, drugs, or large amounts of cash, Mr. Shepherd responded in the negative to both

questions. During this encounter, Agent Wells and Mr. Shepherd spoke in English. However, Agent Wells noticed that Mr. Shepherd spoke with a Bahamian accent.

Then, Agent Wells proceeded to Mr. Armaly, who was the next passenger. Mr. Armaly also seemed to have a Bahamian accent and, although he denied having any identification, had a bus ticket in the name of Mario Miller. *See* Government Exhibit 3. Agent Wells noted that the last name on the ticket was the same as Mr. Shepherd's. Further, the ticket was for a one-way trip to and from the same cities as Mr. Shepherd's ticket and had been purchased the very same minute. Agent Wells asked Defendant Armaly if he was traveling with anyone and if he had any carry-on luggage, both of which he denied. However, when Agent Wells later put his hand on the bag above Mr. Armaly to ask if that particular one was his, Mr. Armaly admitted it was. While touching the bag, Agent Wells did not "squeeze...or manipulate the bag or lift the bag in any way." Second Tr. at 27. Mr. Armaly would not maintain eye contact with the officers and seemed somewhat nervous and rigid.

Agent Wells requested permission to search Mr. Armaly's bag, and Mr. Armaly stated, "Yes." Second Tr. at 28.[6] The officer interpreted this response as consenting to the search. *See id.* After he asked for and thought he received consent, Agent Wells observed Mr. Armaly "kind of scrunched down in his seat." *Id.* However, he did not object to the search or stand up to stop the officer from searching.

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[6] Although the grand jury testimony reflects Agent Wells asked Mr. Armaly if he would mind if he searched his bag and Defendant responded "Yes," Government Exhibit 5; *see also* Second Tr. at 105-06, Mr. Armaly quickly changed his reply to "No, I don't mind." Government Exhibit 5.

The agent never had a doubt that Mr. Armaly gave consent for him to search the bag.

When Agent Wells searched the bag, he found a package containing what appeared to be, based upon his training and experience, a brick of cocaine. At that point, Mr. Armaly was arrested, handcuffed, and escorted off the bus to Agent Savell, who was standing outside the bus with other officers. All the officers outside the bus were wearing plain clothes with their badges hidden and carrying concealed weapons. None of those officers were blocking the door of the bus.

After Mr. Armaly's arrest, Agent Wells and Detective Clausen immediately stepped back onto the bus and finished their check of the other passengers in two or three minutes. Apparently no other passengers were detained for possession of contraband.

During a brief discussion between the two officers at the door of the bus, Agent Wells informed Detective Clausen that Mr. Shepherd's last name was the same as Mr. Armaly's and their tickets were identical. Agent Wells and Detective Clausen approached Mr. Shepherd again and asked if he was traveling with Mr. Armaly. After he stated "no," he was asked if he had any carry-on luggage to which he replied he did not. The officers commented it was odd that he was traveling so lightly for a long trip. Mr. Shepherd explained he was not going to be in Atlanta for long. This time, Mr. Shepherd was nervous and defensive. He avoided eye contact with the officers, and his voice appeared to be a little stressed.

The two officers then stepped off the bus and conversed for approximately ten seconds. They re-entered the bus and asked Mr. Shepherd if he would be willing to accompany them off the bus to answer a few questions. Mr. Shepherd said he would do so and followed the agents off the bus without them touching or handcuffing him. Neither Agent Wells nor Detective Clausen ordered or directed Mr. Shepherd to step off the bus. At the point when Mr. Shepherd exited, there were no law enforcement members from the task force on the bus, and Detective Clausen did not consider Mr. Shepherd to be under arrest.

Detective Clausen thought it took them about ten minutes to perform the entire bus check, including the interview with Mr. Shepherd. Agent Wells thought the entire bus check, up until they asked Mr. Shepherd to step off the bus, probably took about five minutes. Though the bus was scheduled to depart in three or four minutes at the time Mr. Shepherd stepped off the bus, the bus driver was not present at the bus and had not indicated he was ready to depart.

Right after Mr. Shepherd exited the bus, Agent Savell questioned Mr. Shepherd as to his citizenship, and Defendant revealed he did not have any immigration documentation or a passport. At the time of questioning, Mr. Shepherd was not formally detained and no handcuffs had been placed on him. No officers advised him he had to stay. According to Agent Wells' belief, at the time Agent Savell began questioning Mr. Shepherd, the bus had not departed. In fact, following Mr. Shepherd's exiting the bus, it did not leave for four or five minutes.

When the agents found out that the Defendant did not have proper immigration documentation, Border Patrol Agent Hillin was called to the scene. He received a phone call around 7:00 a.m. on the morning of September 18, 2001, and arrived at the bus station within two to four minutes. After he revealed he was a United States Border Patrol Agent, he asked Mr. Shepherd if he would be willing to answer questions concerning his citizenship. When he responded he would, Agent Hillin asked him if he was a United States citizen, and Mr. Shepherd responded he was not. He stated he was a citizen of the Bahamas. Upon asking "if he had any immigration documents that would allow him to be in or remain in the United States legally," First Tr. at 86, Mr. Shepherd responded he did not. At that point, he was placed under administrative arrest and searched incident to his arrest. Agent Savell discovered several documents on Mr. Shepherd that were similar to those found on Mr. Armaly, including a telephone number for "Sporty" and a business card for a Sprint dealer. Second Tr. at 49. Agent Hillin subsequently confirmed that Mr. Shepherd was not a United States citizen but a citizen of the Bahamas, and he learned from Immigration and Naturalization Service (INS) record checks that Defendant had entered the United States several times. According to Agent Hillin, it took him about three minutes from the time he arrived on the scene to question Mr. Shepherd and place him under administrative arrest.

Then, Agent Hillin spoke with Mr. Armaly about his immigration status and determined he was from the Bahamas. He was not a United States citizen and also did not have any immigration documents in his possession. Likewise, an INS check revealed several entries into the United States.

Subsequent to their arrest, Defendants were read their *Miranda*[7] rights and were seated in a marked Jacksonville Sheriff's Office patrol car. While they were inside the car by themselves for a few minutes, a tape recorder hidden in the back seat captured their conversation. The officers then removed the recording device, and Defendants were transported to the DEA office.

Agent Wells conducted a field test of the suspected drugs found in Mr. Armaly's bag, and the substance tested positive for cocaine. Subsequently, a laboratory analysis revealed the drugs weighted approximately four kilograms.

B. Discussion

1. The Initial "Stop"

Defendant Shepherd asserts that, when they asked him to exit the bus, law enforcement improperly detained and seized him without consent, reasonable suspicion, or probably cause. *See* Shepherd's Motion to Suppress at [unnumbered] 2; Shepherd's Memorandum at [unnumbered] 2.

The Government argues Mr. Shepherd's departure form the bus was consensual and did not constitute a seizure because the passengers were advised they could refuse to permit any search or comply with any request the officers made. *See* Opposition at 1, 5, 7-8. In the alternative, reasonable suspicion existed for the officers to detain Defendant briefly and question him. *See id.* At 9-10. Once Mr. Shepherd admitted he was a Bahamian citizen traveling

[7] *Miranda v. Arizona*, 384 U.S. 436 (1966).

without documentation, there was probable cause to arrest him. *See id.* At 12.

Upon consideration, the Court finds asking Mr. Shepherd if he would step off the bus and answer a few questions did not amount to a seizure. The Supreme Court has held:

> [A] seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free "to disregard the police and go about his business," the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.

Florida v. Bostick, 501 U.S. 429, 434 (1991) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)); *see also Immigration and Naturalization Serv. V. Delgado*, 466 U.S. 210, 219-20 (1984). The Court has further stated:

> [E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage -- as long as the police do not convey a message that compliance with their requests is required.

Bostick, 501 U.S. at 434-35 (citations omitted); *see also United States v. Guapi*, 144 F.3d 1393, 1394 (11th Cir. 1998). This rule applies in the context of bus encounters. *See Guapi*, 144 F.3d at 1934. In *Bostick*, the Court stated "[i]n such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." 501 U.S. at 436. Or, put another way, "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Id.* at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

This inquiry is an objective one. *See United States v. Sanchez*, 39 F.3d 715, 717 (10th Cir. 1996). Factors relevant to the inquiry include:

> the threatening presence of several officers; the brandishing of a weapon by an officer; some physical touching by an officer; use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory; prolonged retention of a person's personal effects such as identification and plane or bus tickets; a request to accompany the officer to the station; interaction in a nonpublic place or a small, enclosed space; and absence of other members of the public.

Id. at 718. Further, a seizure does not necessarily occur during a bus check when officers fail to advise the passengers

of their right to refuse consent. *See United States v. Ozuna*, 129 F. Supp. 2d 1345, 1353 (S.D. Fla. 2001) (citing *United States v. Smith*, 201 F.3d 1317, 1321 (11th Cir. 2000)).

Defense counsel cited *Guapi* and *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998), in support of his argument that Defendant was illegally seized. In *Guapi* and *Washington*, the Eleventh Circuit found bus checks that were somewhat similar to the one before the Court violated the Fourth Amendment. However, those decisions can be distinguished form the instant case based on the following.

In *Guapi*, the officer announced:

> I'm Officer Marvin Whitfield with the Mobile Police Department Drug Interdiction Unit. With your cooperation, I'd like to check on-board cargo for illegal contraband such as alcohol, narcotics, weapons, or explosives. With your consent and cooperation, I'd like to ask you to bring down your on-board luggage if you have any overhead and have it open so I can do a quick on-board inspection.

144 F.3d at 1394. In *Washington*, the agent declared:

> Good morning, ladies and gentlemen. My partner and I are both federal agents with the United States Department of Justice. No one is under arrest or anything like that, we're just conducting a routine bus check. When we get to you, if we could please see your

> bus ticket, some photo identification if you have some with you, please, and if you would please identify which bag [] is your s on the bus we'd appreciate it and we'll be out of your way just as quick as we can.

151 F.3d at 1355. In determining the constitutionality of the seizure, the Eleventh Circuit emphasized the "complete lack of any notification to the passengers that they were in fact free to decline the search request." *Guapi*, 144 F.3d at 1395.

> While we eschew the notion of a *per se* rule requiring bus passengers to be informed of their constitutional rights prior to a search, the absence of such a notice is an important factor in this case. *Providing a simple notification to bus passengers that they are free to decline a search is perhaps the most efficient and effective method to ensure compliance with the Constitution.*

Id. (emphasis added); *see also Washington*, 151 F.3d at 1357 (stating "[a]bsent some positive indication that they were free not to cooperate, it is doubtful a passenger would think he or she had the choice to ignore the police presence").

The law enforcement officers' actions in effectuating the drug interdiction complied with the dictates of *Guapi* and *Washington*. Each officer boarded the bus dressed in plain clothes and no weapons were revealed. The evidence suggests the agents only displayed their badges on their belts, never holding them or raising them above their heads in an effort to emphasize a show of authority. *See Washington*, 151

F.3d at 1357. While standing at the front of the bus, Agent Wells specifically related to the passengers they were not under arrest. He then explicitly stated "they were free to leave, and that they were free to decline any interviews or searches that [the officers] would request." Second Tr. at 12. Such a statement is in fact "a simple notification" as contemplated by the Eleventh Circuit in *Guapi* and *Washington*.

It has not been shown that the officers' interaction with other passengers would lead a reasonable person to believe Defendant had been seized. Although a bus is an enclosed space, the presence of other passengers and windows through which bystanders may observe at least some of the events help to counterbalance this factor. Since the other officers present outside the bus were dressed in plain clothes and their badges and guns were hidden, Defendant would not have known necessarily they were law enforcement personnel connected to the bus check. After making the initial announcement, the two officers proceeded to the back of the bus and conducted their interviews in a manner that kept the path clear for prospective interviewees to leave, if they so wished. The testimony does not suggest any aggressive language or compulsory tone was used. No weapons were brandished, nor was there a showing that physical touching of passengers occurred. No evidence suggests the officers said or did anything to indicate the notification of freedom to refuse an interview or search was other than sincere. Hence, the Defendant failed to demonstrate that circumstances during the bus check indicated he could not choose to decline any interviews or requests by the officers. *See Ozuna*, 129 F. Supp. 2d at 1353; *see also United States v. Carhee*, 27 F.3d 1493, 1496 (10th

Cir. 1994) (indicating the "burden of proving whether and when the Fourth Amendment was implicated" was on the defendant).

In fact, it is concluded Mr. Shepherd was not at that point in time seized pursuant to the Fourth Amendment. Under the totality of circumstances, a reasonable person would have felt free to decline the officers' request or otherwise terminate the encounter. Indeed, the passengers on the bus were told as much. The record indicates Mr. Shepherd chose to converse with the officers and willingly followed them off the bus prior to the departure time to answer their questions. These circumstances suggest the encounter was consensual instead of a Fourth Amendment seizure. *See Bostick*, 501 U.S. at 434.

Even if the Court found that Mr. Shepherd had been seized at the time he exited the bus, such would not have violated his constitutional rights. The officers had a reasonable suspicion to believe he was in the process of committing a crime, specifically that he was engaged in a conspiracy to possess or distribute illegal drugs with Mr. Armaly. In *Berkemer v. McCarty*, the Supreme Court observed that:

> Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion. [T]he

> stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.

468 U.S. 420, 439 (1984) (footnotes and citations omitted).

> Although reasonable suspicion "requires more than a hunch, the requisite level of suspicion to make an investigative stop is 'considerably less than proof of wrongdoing by a preponderance of the evidence.'" In deciding whether the detaining officers had reasonable suspicion, we look at the totality of the circumstances known to the detaining officers at the time of the detention. And, we view the totality of the circumstances in the light of the officers' special training and experience. We also bear in mind that behavior, seemingly innocuous to the ordinary citizen, may "appear suspect to one familiar with the practices of narcotics couriers."

Smith, 201 F.3d at 1323 (citations omitted).

In the instant case, assuming *arguendo* Mr. Shepherd was seized at the time he followed the agents off the bus, Agent Wells articulated sufficient facts that combined to form a reasonable suspicion he was involved in drug activity,

and this reasonable suspicion allowed the officers to detain Mr. Shepherd briefly. For instance, Agent Wells indicated Defendants had the same itinerary, same last names on their tickets, and same type of Bahamian accents. They also sat in close proximity to each other on the bus, bought their tickets at exactly the same minute, which was only forty minutes before the departure time, and paid in cash for a one-way trip. Further, Mr. Shepherd appeared nervous, and the individual he was associated with was found to be in possession of cocaine. *Cf. Id.* (finding that nervousness can be factor bearing upon reasonableness of suspicion of illegal activity). Despite the factors tending to indicate they were traveling together, each Defendant denied traveling with anyone else on the bus. *See* Opposition at 9-10. Although none of these factors alone could necessarily constitute a reasonable suspicion, these facts combined convince the Court that the officers had a reasonable suspicion that Mr. Armaly and Mr. Shepherd were traveling together in order to possess or distribute illegal drugs. Therefore, at the time Mr. Shepherd was asked to answer questions outside the bus, Agent Wells could have properly detained and questioned him for a brief period of time based on reasonable suspicion.

Once it was determined that Mr. Shepherd was a Bahamian citizen without the necessary immigration documents, probable cause existed to arrest him. Border patrol officers have authority to effect warrantless arrests when they have reason to believe the alien is illegally in the United States and is likely to escape before an arrest warrant can be obtained. *See* 8 U.S.C. § 1357 (a) (2).

When Mr. Shepherd exited the bus, the driver had not stepped back aboard or signaled to the officers that he was

ready to leave. Shortly after Mr. Shepherd left the bus, Agent Savell began to question him, and, while the bus was still there, he admitted he possessed no passport or other immigration documents. Though Mr. Shepherd had no documentation, he seemed to be a citizen of the Bahamas, as, in addition to a Bahamian accent, he had a Bahamian driver's license that was apparently issued on September 25, 1998, and expires on September 25, 2002. At that time, the evidence that he was a Bahamian citizen traveling without the required immigration documentation or passport constituted probable cause to arrest because the agents had reason to believe he was not legally present. *See* 8 U.S.C. § 1304 (e); 8 U.S.C. § 1357 (a) (2); *see also* Opposition at 12. Any attempt to obtain an arrest warrant would likely have resulted in Defendant's flight, especially in light of the fact that he was encountered at a bus station.[8] Therefore, Agent Savell was authorized to hold Mr. Shepherd while awaiting the arrival of Agent Hillin. *Cf. United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999) (finding state and local law enforcement officers could "participate in the process of enforcing federal immigration laws").

2. Consent to Search Carry-on

Mr. Armaly asserts his consent was not obtained voluntarily even though he "fail[ed] to object to the agents' demands." Armaly's Motion to Suppress at [unnumbered] 3. Additionally, he alleges "no reasonable implication [of consent] could be drawn from the conversation and conduct

[8] Agent Hillin believed there was a high likelihood Defendant would escape if he was not arrested immediately because he was already in transit. *See* First Tr. at 91.

of Armaly and Special Agent Wells." Armaly's Memorandum at 4. The government contends that his consent to search was voluntarily given under the totality of the circumstances. *See* Opposition at 14-15.

The Fourth Amendment allows a search, absent probable cause or a warrant, when consent has been obtained for the search. *See United States v. Gonzalez*, 71 F.3d 819, 827 (11th Cir. 1996) (quoting *United States v. Freyre-Lazaro*, 3 F.3d 1496, 1500-01 (11th Cir. 1993)). To satisfy Fourth Amendment requirements, consent to a search must be voluntarily given. *See id.* at 828. The United States has the burden of proving the consent was freely and voluntarily given, and such burden is not satisfied by showing a mere submission to a claim of lawful authority. *See Florida v. Royer*, 460 U.S. 491, 497 (1983).

"'[F]or consent to a search to be deemed voluntary, it must be the product of an essentially free and unconstrained choice.'" *Hudson v. Hall*, 231 F.3d 1289, 1296 (11th Cir. 2000) (quoting *United States v. Garcia*, 890 F.2d 355, 360 (11th Cir. 1989)). In making a determination whether an individual's consent is voluntary, the totality of the circumstances is considered. *See id.* Factors relevant to this determination include:

> the presence of coercive police procedure, the extent of the defendant's cooperation with the officer, the defendant's cooperation with the officer, the defendant's awareness of his right to refuse consent, the defendant's education and intelligence, and the defendant's belief that no incriminating evidence will be found.

United States v. Purcell, 236 F.3d 1274, 1281 (11th Cir. 2001).

The totality of the circumstances reveals Mr. Armaly knowingly and voluntarily consented to the search of his luggage. When approached by the law enforcement officers and asked, the record indicates Defendant verbally consented to a search of the bag located above him. Agent Wells testified he requested permission to search Mr. Armaly's bag, and Mr. Armaly stated, "Yes." Second Tr. at 28. The agent's grand jury testimony reflects that, when he queried Mr. Armaly as to whether he minded if he searched his carry-on bag, Defendant indicated, "Yes," but then stated, "No. I don't mind." Government Exhibit 5. Both versions of the conversation convince the court Mr. Armaly gave consent to the search.

No evidence exists that would establish he was forced or coerced into providing his consent, and there has been no showing Defendant merely acquiesced to police authority. Agent Wells announced to the passengers at the outset of the bus check that they were not required to consent to any search or to participate in any interview. The record indicates Mr. Armaly cooperated with the police before the narcotics were located. No coercive police behavior occurred, as the officers were dressed in plain clothes and concealed their weapons. Further, the evidence shows agent Wells and Detective Clausen donned their badges on their belts. Finally, the officers positioned themselves so as not to block the aisle leading to the door of the bus with Agent Wells positioned to the rear of Mr. Armaly's seat and Detective Clausen behind

him. Therefore, Defendant was not confronted with an overtly threatening police presence.

As discussed above, a reasonable person in Defendant's position would have felt free to refuse the interview and terminate the encounter with the officers. Therefore, under the totality of the circumstances, the Court concludes the consent to search was voluntarily given. As the search was valid, Mr. Armaly's statements and personal items that were retrieved by Agent Savell, who searched him after his arrest, should not be suppressed.

3. Statements Inside Patrol Car

Defendants apparently contest the legality of surreptitiously recording their conversations in the rear of the police vehicle. *See* Armaly's Motion to Suppress at [unnumbered] 1, 2; Shepherd's Motion to Suppress at [unnumbered] 1, 2.

Defendants' constitutional rights were not violated by such a tape recording because "a person seated in a police car does not have a reasonable expectation of privacy under Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510, *et seq.* nor the Fourth Amendment to the Constitution." *United States v. McKinnon*, 985 F.2d 525, 526 (11th Cir. 1993); *accord United States v. Gilley*, 43 F.3d 1440, 1441 (11th Cir. 1995) (per curiam); *see also United States v. Turner*, 209 F.3d 1198, 1201 (10th Cir.), *cert denied* 531 U.S. 887 (2000). Therefore, because Defendants had no reasonable expectation of privacy in their conversation while in the back seat of a police car, they have no standing to contest the use of these statements.

Appendix C

RECOMMENDATION

Accordingly, it is suggested the Clerk of the Court be instructed to terminate the Motion in Limine (Doc. #27) from the undersigned's pending motion sheet and place it on the district court's pending motion list. Additionally, it is recommended that Armaly's Motion to Suppress (Doc. #30) and Shepherd's Motion to Suppress (Doc. #31) be **DENIED.**

ENTERED at Jacksonville, Florida, this 7th day of December, 2001.

HOWARD T. SNYDER
United States Magistrate Judge

Copies to:

Hon. Ralph W. Nimmons, Jr.
United States District Judge

Counsel of record

Defendant